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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1172

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL.,
Petitioners,

v.

COLONEL R. H. BURSON
DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WESTMORELAND, HALL & BRYAN
3000 First National Bank Tower
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Counsel for Petitioners

IN THE

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Respondents.

The Clerk will enter my appearance as counsel for the Petitioners.

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Atlanta, Georgia 30303

The Clerk is requested to notify counsel of action of the Court by means of:

( ) Collect Telegram

(x) Airmail Letter

( ) Regular Mail

In this case the person to be notified for Petitioners is:

Edward E. Bates, Jr.
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DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 6, 1972, petition for rehearing denied on January 5, 1973.

CITATION TO OPINIONS BELOW

The opinion of the Three-Judge Panel of the District Court for the Northern District of Georgia denying

Petitioners' prayer for declaratory judgment and injunctive relief is printed in Appendix C hereto and is reported at 320 F. Supp. 706 (D.C.N.D.Ga. 1970). The opinion of the One-Judge District Court for the Northern District of Georgia finding that Petitioners are entitled to an injunction is printed in Appendix B hereto and is reported at 326 F. Supp. 1251 (D.C.N.D. Ga. 1971). The opinion of the Court of Appeals for the Fifth Circuit, which vacated and remanded the judgment of the One-Judge District Court for the Northern District of Georgia, is printed in Appendix A hereto and has not yet been reported. The judgment and order of the Court of Appeals for the Fifth Circuit denying rehearing is printed in Appendix E.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on December 6, 1972, and the petition for rehearing denied on January 5, 1973. The Court of Appeals recalled and stayed its mandate to and including March 1, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Did the Court below err in holding that the District Court's injunction encompassed "pending" as well as future state prosecutions, thus raising the problems considered by the Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and by the Fifth Circuit Court of Appeals in *Becker v. Thompson*, 459 F. 2d 919 (5th Cir. 1972).

(2) Did the Court below err in holding that even where the action for declaratory relief was brought in the District Court several months prior to the institution of state criminal proceedings against the Petitioners, the District Court should not have considered issuance of an injunction in aid of its jurisdiction under 28 U.S.C., Section 2283, without having first applied the *Younger* restrictions regarding *interference* in the state criminal prosecutions?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The following constitutional provision and statutes, being lengthy, are set forth in Appendix D hereto.

(1) The constitutional provision involved is the "due process" and "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

(2) The statutes under which Petitioners were threatened with prosecution are Ga. L. 1968, pp. 436-441, Ga. Code Ann. Chpt. 92A-11 (Supp. '70), and its related criminal statute, Ga. Code Ann., Section 92A-9926.

(3) The statute under which federal jurisdiction was invoked is 28 U.S.C., Section 1331.

(4) The statutes under which the Three-Judge Panel was convened are 28 U.S.C., Section 2281 and 28 U.S.C., Section 2284.

(5) The statute under which the One-Judge District Court declared the state statute unconstitutional as applied is 28 U.S.C., Section 2201.

(6) The statute under which the One-Judge District

Court granted the injunction against state criminal prosecution of the Petitioners is 28 U.S.C., Section 2283.

STATEMENT OF THE CASE

In 1968 the Georgia General Assembly enacted the Driver Training School Act, hereinafter referred to as the "Act," which was approved by the Governor on March 27, 1968. Ga. L. 1968, pp. 436-441; Ga. Code Ann., Chpt. 92A-11 (Supp. 1970). Section Two of the Act provides:

> "No person shall operate a driver training school or engage in the business of giving instruction for hire in the driving of motor vehicles . . . unless a license therefore has been received from the department." 92A-1102 (Acts 1968, pp. 436, 437).

Section Four provides:

> "Every person in order to qualify as instructor for a driving school shall meet the following requirements . . . (b) Must present to the department evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia." 92A-1104 (Acts 1968, pp. 436, 438).

Section Ten of the Act provides:

> "This Chapter shall not apply to an accredited elementary school, secondary school, junior college or college conducting a driver training course, nor shall it apply to driver improvement schools operated by this State, a county or municipality thereof." 92A-1109 (Acts 1968, pp. 436, 441).

The penal sanctions are found in Section 92A-9926:

> "Any person violating any provision of Chapter 92A-11, which regulates driver training schools,

shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1968, pp. 436, 441).

Petitioners are commercial driving schools and their instructors in the State of Georgia. Respondents are public officials charged with enforcing the Act. Named were Col. R. H. Burson, Director of Georgia Department of Public Safety, Mr. Hinson McAuliffe, Solicitor of the Criminal Court of Fulton County, Herbert T. Jenkins, Chief of Police, City of Atlanta, Georgia, and Mr. J. B. Angelo Crowe, a consultant in driver training employed by the State Board of Education.

On August 25, 1970, Petitioners filed suit in the United States District Court, Northern District of Georgia challenging the constitutionality of the Act. The complaint asked that the Act be declared unconstitutional because it violated the "due process" and "equal protection" clause of the Fourteenth Amendment to the United States Constitution, and prayed for a temporary and permanent injunction enjoining and restraining the Respondents from enforcement of the educational requirements of the Act.

On September 29, 1970, Petitioners filed an amendment to the complaint alleging that the educational requirements of 92A-1104(b) were not being applied equally to commercial driving instructors and to instructors in the public schools.

The complaint was originally brought as a class action on behalf of all persons similarly situated to named Petitioners and proper notice was given pursuant to Rule 23(c)(2), F.R.C.P. on October 8, 1970. Requests for exclusion by certain members of the class were filed on October 15, 1970.

At the Three-Judge hearing held on October 19, 1970, Respondents argued that the Act merely required of commercial driving instructors what the public school teachers were already required to do and were in fact doing. The order and judgment of the Three-Judge District Court entered on December 30, 1970 (App. C, p6C) held that the Act was constitutional on its face, but the holding specifically provided that it was without prejudice to plaintiff's right to contest an unconstitutional application of the Act by State officers. (App. C, p6C).

On January 21, 1971, the Petitioners filed a notice of appeal from the order and judgment of the Three-Judge Court to the Supreme Court of the United States pursuant to 28 U.S.C., Section 1253. On March 23, 1971, the Petitioners moved that the appeal be withdrawn pursuant to Rule 14(1) of the Supreme Court of the United States, and also moved for a temporary injunction. The order entered on March 23, 1971 provided that the appeal was allowed to be withdrawn and set a hearing on the temporary injunction for March 31, 1971. The record was never docketed in the Supreme Court and was returned unopened from the United States Supreme Court on March 26, 1971.

At the hearing on March 31, 1971, before the Single-Judge District Court, Respondents moved the Court to dismiss proceedings on unconstitutional application of the Act on the ground that the appeal to the Supreme Court of the United States was improperly dismissed. After a full hearing on the question, the District Court denied the motion and the appeal was again ordered dismissed.

At the hearing on March 31, 1971 the Single-Judge

Court found, based on the evidence introduced, that the Act was not being administered with an even hand. (App. B, p.4B). Numerous driving instructors from public schools and colleges testified that they were teaching driver training, although none had completed the required three courses. The State Patrol Officers testified that the agency had no intention of enforcing the Act against public school instructors. On the other hand, the Petitioners testified that they had applied for licenses and been refused because of not meeting the educational requirements and that several days before the March 31 hearing four Petitioners had also been issued citations for violation of the Act.

On April 15, 1971, the District Court entered an order holding that the Petitioners were entitled to injunctive relief as prayed (App. B, p. 6B) and directed counsel for Petitioners to prepare and submit to the Court an order to this effect. Thereafter, the Court entered an order and judgment enjoining the Respondents from the further enforcement of the educational requirements of the Act until it could be shown that the Act would be enforced in a non-discriminatory manner. The Court pointed out that at the Three-Judge hearing, the Respondents assured the Court that under the Act all driving instructors were to be treated the same. However, under the evidence presented at the Single-Judge hearing, it was proved and Respondents admitted that the Act was being applied in a manner that exempted driving instructors employed by the public school system. (App. B, p. 4B).

In its decision the District Court considered *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971), deciding that, since the federal action for

declaratory and injunctive relief had been pending for several months prior to the issuance of citations by the state, injunctive relief in aid of the Court's jurisdiction would not be in conflict with *Younger*. (App. B, p.5B n. 2).

Respondents filed a notice of appeal from the District Court order on August 13, 1971.

On appeal, the Court of Appeals for the Fifth Circuit vacated the judgment of the District Court and remanded the case for reconsideration in light of the United States Supreme Court's decision in *Younger v. Harris* and by the Fifth Circuit in *Becker v. Thompson*, 459 F.2d 919 (5th Cir., 1972) (See Appendix A). Although *Younger* had been considered by the District Court, the Court of Appeals found the District Court had misinterpreted *Younger*, because the District Court had found its action not in conflict with *Younger* for the reason that there was no state prosecution pending when the District Court's jurisdiction attached. Under the rationale of *Becker v. Thompson*, the Court of Appeals refused to recognize a distinction between Federal Court intervention where state criminal prosecution is imminent or threatened and intervention where state criminal prosecution is already pending. Thus, the case was remanded and the District Court instructed to apply *Younger* standards equally to threatened as well as pending state criminal prosecutions.

Following the December 6, 1972 opinion and judgment of the Court of Appeals (Appendix A), petitioners requested a rehearing which was denied on January 5, 1973.

The mandate of the Court of Appeals issued on

January 15, 1973, but pursuant to the motion of Petitioners, was recalled and stayed to and including March 1, 1973, pending application for a writ of certiorari to the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

The decision of the court below, based upon the much-debated rationale of its decision in *Becker v. Thompson*, 459 F.2d 919 (5th Cir., 1972), *rehearing and rehearing en banc denied*, 463 F.2d 1338 (5th Cir., 1972), holds that a federal declaratory judgment action challenging the constitutionality of a state criminal law is subject to the restrictions imposed by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971) and companion cases, regardless of whether prosecutions under that law have been initiated. This position has heretofore been rejected by the First Circuit, viz., *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir., 1972), the Third Circuit, viz., *Lewis v. Kugler*, 446 F.2d 1343 (3rd Cir., 1971), the Sixth Circuit, viz., *Crossen v. Breckenridge*, 446 F.2d 833 (6th Cir., 1971), and rejected or ignored by at least four District Courts, viz., *Anderson v. Vaughn*, 372 F. Supp. 101 (D. Conn. 1971); *Thoms v. Smith*, 334 F. Supp. 1203 (D. Conn. 1971); *Maldonado v. County of Monterey*, 330 F. Supp. 1282 (N.D. Cal. 1971); *Mitchell Family Planning, Inc. v. City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972).

In addition, the validity of the Fifth Circuit's position that *Younger* restrictions apply equally to threatened as well as pending state criminal prosecution becomes even more suspect in view of the Supreme Court's pronouncement that the reasoning supporting the application of the *Younger* doctrine has "little force in the

absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1794 at 1757, 32 L.Ed.2d 257 (1972).

The Fifth Circuit has agreed with other Circuits that the Supreme Court in *Younger* reserved the question of whether the same standards governing abstention would apply in cases in which there is no pending state prosecution. See *Becker v. Thompson, supra*, 459 F.2d at 922; *Wulp v. Corcoran, supra*, 454 F.2d at 830; *Lewis v. Kugler, supra*, 446 F.2d at 1347. However, in direct conflict with the other Circuits, the Fifth Circuit has chosen to apply the same rigorous standard of irreparable injury as defined in *Younger* to a case where no state prosecution is pending. *Becker v. Thompson, supra*, 459 F.2d at 922; *Kent Milner d/b/a Belvedere Driving School v. Colonel R. H. Burson*, ___ F.2d ___ (5th Cir., 1972).

The other Circuit and District Courts which have considered the question have found that to apply *Younger* restrictions to cases where no state action is pending is to in effect concede that there is no room left for the use of the Federal Declaratory Judgment Act, 28 U.S.C., Section 2201, in testing state and federal criminal statutes. See e.g., *Wulp v. Corcoran*, 454 F.2d 826, 832 (1st Cir., 1972); *Lewis v. Kugler*, 446 F.2d 1343, 1347-1348 (3rd Cir., 1971); *Anderson v. Vaughn*, 327 F. Supp. 101, 102 (D. Conn. 1971).

Petitioners agree that judicially imposed limitations on declaratory and injunctive relief are appropriate when a state prosecution is already underway, because

a federal declaratory judgment action would almost invariably disrupt that proceeding, which may by itself provide the defendant with an adequate procedural vehicle for testing the law's constitutionality. *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688 (1971). But such considerations are absent when the federal plaintiff has not yet been arrested or charged and therefore, apart from a declaratory judgment action, has no choice but to obey the potentially unconstitutional application of the statute or to disobey it and risk fine or imprisonment on the ultimate outcome.

Although the court below makes the statement that the District Court injunction encompassed "*pending* as well as future prosecutions," (emphasis added) surely the Court is not implying that the criminal citations issued to several Petitioners months after federal jurisdiction had attached and after the Three-Judge hearing but just before the final One-Judge hearing, became "pending" proceedings under the anti-injunction statute or *Younger*. The Supreme Court made it clear in *Younger* that in referring to "pending" state prosecutions, it had reference only to state proceedings initiated prior to the filing of the federal action. *Younger v. Harris, supra*, 401 U.S. at 41, 91 S.Ct. at 749, 27 L.Ed. 2d at 674):

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts *at the time the federal proceeding is begun.*" (emphasis added).

While in *Younger* it was not necessary for the Court to decide the propriety of federal relief when a state prosecution was initiated after the federal suit was filed but was pending at the time of the federal hearing, the

Court has held that state prosecutions are not pending within the intendment of the federal anti-injunction act, 28 U.S.C.A., Section 2283, when initiated subsequent to the federal action. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2, 85 S.Ct. 1116 (1965). See *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

To allow the state to so alter the nature of federal proceedings, especially after hearings have been held and jurisdiction retained for further hearings, would be to distort beyond recognition the clear import of *Younger, Dombrowski* and related cases, and would, in effect, allow the state to usurp the jurisdiction of the federal courts.

CONCLUSION

The judgment below is in direct conflict with the decisions of several other Courts of Appeal and District Courts on the same matter. As such, it represents a unique and unwarranted extention of the Supreme Court's decisions in *Younger v. Harris*, and related cases. Because of the conflict among the Circuits, created by the Fifth Circuit's position in the decision below, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WESTMORELAND, HALL & BRYAN

BY: _____

BY: _____

BY: _____

BY: _____

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PROOF OF SERVICE

I, JOHN L. WESTMORELAND, JR., one of the attorneys for Kent Milner d/b/a Belvedere Driving School, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .. day of February, 1973, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

(1) On Col. R. H. Burson, Director of Georgia Department of Public Safety, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T. Beasley, 132 State Judicial Building, 40 Capitol Square, N. W., Atlanta, Georgia 30334.

(2) On Hinson McAuliffe, Solicitor of the Criminal Court of Fulton County, by mailing three copies in a duly addressed envelope, with first class postage prepaid to Hinson McAuliffe, 53 Civil-Criminal Courthouse, 160 Broad Street, S. W., Atlanta, Georgia 30303.

(3) On Herbert T. Jenkins, Chief of Police, City of Atlanta, Georgia, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Henry L. Bowden, 2614 First National Bank Building, Atlanta, Georgia 30303.

(4) On J. B. Angelo Crowe, Driver Training Consultant, State Board of Education, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T. Beasley, 132 State Judicial Building, 40 Capitol Square, N. W., Atlanta, Georgia 30334.

Attorney for Petitioners

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APPENDIX

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 71-2853

KENT MILNER d/b/a BELVEDERE DRIVING SCHOOL, ET AL,

Plaintiffs-Appellees,

versus

COLONEL R. H. BURSON, Director of the Georgia Department of Public Safety, ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(December 6, 1972)

Before GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Plaintiffs-appellees brought this action seeking a declaratory judgment that portions of Georgia's Driver Training School License Act, Ga. Code Ann. § 92A-11,[1] were unconstitu-

[1] The pertinent sections of the Act are:

92A-1101. Definitions.—The following words and phrases when used in this Chapter shall, unless the content other-

wise requires, have the meanings respectively ascribed to them in this section:

(a) "Motor vehicle": Every vehicle which is self-propelled upon or by which any person or property is or may be transported or drawn upon a public highway except devices used exclusively upon stationary rails or tracks.

(b) "Driver training schools": Any person, partnership or corporation giving driving instruction to 10 or more persons per calendar year for the purpose of meeting requirements for licensed driving of motor vehicles in Georgia.

(c) "Person": Every natural person, firm, copartnership, association, corporation, or school.

(d) "Department": The State Department of Public Safety acting directly or through its duly authorized officers and agents.

(e) "Driver's license examiners": Examiners appointed by the Department of Public Safety for the purpose of giving driver's license examinations.

92A-1102. Necessity for licenses.—No person shall operate a driver training school or engage in the business of giving instruction for hire in the driving of motor vehicles or in the preparation of an applicant for examination given by driver's license examiners for a driver's license or permit, unless a license therefor has been secured from the department. (Acts 1968, pp. 436, 437.)

92A-1103. Qualifications of persons operating driving schools.—Every person in order to qualify to operate a driving school shall meet the following requirements:

(a) Be of good moral character.

(b) Maintain an established place of business to the public.

(c) Maintain bodily injury and property damage liability insurance on motor vehicles while used in driving instruction, insuring the liability of the driving school, the driving instructors and any person taking instruction in at least the following amounts: $100,000 for bodily injury to or death of one person in any one accident and, subject to said limit for one person, $200,000 for bodily injury to or death of two or more persons in any one accident and the amount of $20,000 for damage to property of others in any one accident. Evidence of such insurance coverage in the form of a certificate from the insurance carrier shall be filed with the department, and such certificate shall stipulate

that the insurance shall not be cancelled except upon 10 days prior written notice to the department. Such insurance shall be written by a company authorized to do business in this State.

(d) Provide a continuous surety company bond in the principal sum of $2,500 for the protection of the contractual rights of students in such form as will meet with the approval of the department and written by a company authorized to do business in this State. However, the aggregate liability of the surety for all breaches of the condition of the bond in no event shall exceed the principal sum of $2,500. The surety on any such bond may cancel such bond on giving 30 days notice thereof in writing to the department and shall be relieved of liability for any breach of any condition of the bond which occurs after the effective date of cancellation.

(e) Have the equipment necessary to the giving of proper instruction in the operation of motor vehicles as prescribed by the department.

(f) Pay to the department an application fee of $25.

92A-1104. Qualifications of instructors for driving schools.—Every person in order to qualify as instructor for a driving school shall meet the following requirements:

(a) Be of good moral character.

(b) Must present to the department evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia.

(c) Be physically able to operate safely a motor vehicle and to instruct others in the operation of motor vehicles.

(d) Hold a valid driver's license.

(e) Pay to the department an application fee of $5.

. . .

92A-1105. Licenses; issuance; expiration; renewal.—

(a) The department shall issue a license certificate to each applicant to conduct a driver training school or to each driver training instructor when the department is satisfied that such person has met the qualifications required under this Chapter.

(b) All outstanding licenses issued to any driver training school or driver training instructor pursuant to the provisions of this Chapter shall expire as a matter of law at midnight on September 30 of the calendar year for which the license was issued and must be renewed annually,

unless sooner canceled, suspended or revoked under the provisions of section 92A-1107.

(c) The license of each driver training school and each driver training instructor may be renewed subject to the same conditions as the original license, and upon payment of the same fee.

(d) All applications for renewal of a driver training school license or driver training instructor's license shall be on a form prescribed by the department, and must be filed with the department not more than 60 days nor less than 10 days preceding the expiration date of the license to be renewed.

92A-1106. Department to prescribe rules and regulations.—The department is authorized to prescribe by rule standards for the eligibility, conduct, equipment, and operation of driver training schools and instructors and to adopt other reasonable rules and regulations to carry out the provisions of this Chapter.

92A-1107. Cancellation, suspension, or revocation of licenses.—The department may cancel, suspend, revoke, or refuse to renew any driver training school or driver training instructor's license, upon good cause being shown and after 10 days notice to the license holder:

(a) When the department is satisfied that the licensee fails to meet the requirements to receive or hold a license under this Chapter.

(b) Whenever the licensee fails to keep the records required herein.

(c) Whenever the licensee permits fraud or engages in fraudulent practices either with reference to the applicant or the department, or induces or countenances fraud or fraudulent practices on the part of any applicant for a driver's license or permit.

(d) Whenever the licensee fails to comply with any provision of this Chapter or any rules of the department made pursuant thereto.

(e) Whenever the licensee represents himself as an agent or employee of the department or license examiner or uses advertising designed to lead or which would reasonably have the effect of leading persons to believe that such licensee is in fact an employee or representative of the department or license examiner.

(f) Whenever the licensee or any employee or agent of the licensee solicits driver training or instruction in an

tional. They also sought temporary and permanent injunctive relief against the state officials responsible for enforcing this statute and the related criminal statute, Ga. Code Ann. § 92A-9926.[3] A three-judge district court was convened under 28 U.S.C. §§ 2281 and 2284. That court issued a declaratory judgment holding the statute facially constitutional and, therefore, denied the requested injunctive relief. The court decided that the unconstitutional as applied allegations of the complaint did not have to be heard by a three-judge court and remanded that portion of the case to the district court. *See Phillips v. United States*, 312 U.S. 246 (1941); *McGuire v. Sadler*, 337 F.2d 902 (5th Cir., 1964); 1A J. Moore, Federal Practice ¶0.205 at 2238 (2nd ed. 1965). The district court subsequently held that the statute was being applied in an unconstitutional manner. The court did not declare the

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office of any department of the State having to do with the administration of any law relating to motor vehicles.

(g) Whenever the licensee or any employee or agent, serving as a driver training instructor, has had his license canceled, suspended, or revoked.

. . .

92A-1109. Exemptions from Chapter.—This Chapter shall not apply to an accredited elementary school, secondary school, junior college or college conducting a driver training course, nor shall it apply to driver improvement schools operated by this State, a county or a municipality thereof. The constitutional attack was primarily directed at §92A-1104(b) and §92A-1109.

[3] This statute reads as follows:

92A-9926. Violations of Chapter 92A-11, the Driver Training School License Act.—Any person violating any provision of Chapter 92A-11, which regulates driver training schools, shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor.

statute unconstitutional however, but awarded injunctive relief by enjoining enforcement of the Act against plaintiffs and enjoining state officials from prosecuting plaintiffs for violations of the Act. The defendants have appealed.

We vacate the order of the district court and remand for re-consideration in light of the Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971).[3]

The district court's injunction restrained "continued prosecutions of plaintiffs for violations of the Act under any citation heretofore issued since the filing of this action and while this court retains jurisdiction of this case." The court intended to retain jurisdiction "until such time as it shall appear to the court that the Act will not be enforced in a discriminatory manner." The injunction obviously encompassed pending as well as future prosecutions, thus raising the problems considered by the Supreme Court in *Younger v. Harris* and by this court in *Becker v. Thompson*, 459 F.2d 919 (5th Cir., 1972) [Tuttle concurring in result].[4] Even though the district court considered *Younger*, it reasoned that: "No action taken by this court is in conflict with *Younger*. The jurisdiction of this court clearly attached several months prior to the institution of

[3] Five other cases were decided with *Younger*, *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971).

[4] The majority of the *Becker* panel held that "in preprosecution cases there must be a showing of bad faith harassment for the granting of declaratory as well as injunctive relief." Id. at 923. *See Cooley v. Endicator*, 458 F.2d 513 (5th Cir., 1972).

proceedings against these plaintiffs and the injunction today is merely in aid of the prior jurisdiction of the court." It appears that the district court was relying on the second exception to the anti-injunction statute, 28 U.S.C. § 2283, which allows a federal court to enjoin state court proceedings "where necessary in aid of its jurisdiction." However, before reaching the question whether it could act within an exception to § 2283, a federal district court is required by *Younger* to determine whether general equitable principles support its inference[*] in state criminal prosecutions.[5] "*Younger supra*, and its companion case, *Samuels v. Mackell*, 401 U.S. 66 (1971), established that federal intervention—by way of injunction or declaratory relief—in a state's enforcement of its criminal laws is improper unless the plaintiff can prove that the enforcement of those laws against him creates a threat to his federally protected rights as cannot be eliminated by the defense of a single state prosecution." *Palaio v. McAuliffe*, ____ F.2d ____ (5th Cir., 1972) [No. 71-2625, September 21, 1972]. These principles are particularly relevant where, as in the case at bar, the statute had already been declared facially constitutional.[6] Before

[5] Mr. Justice Black completed his opinion for the Court in *Younger* by stating: "Because our holding rests on absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. § 2283, which prohibits an injunction against state court proceedings 'except as expressly authorized by Act of Congress' would in and of itself be controlling under the circumstances of this case." Id. at 54. *See Dyson v. Stein*, 401 U.S. 200, 203 (1971).

[6] The three-judge court which made this ruling acted prior to *Younger* and its companion cases.

[*Ed. Note: Petitioners believe the Court intended "inference" to read "interference."]

taking any action with respect to the allegations of unconstitutional application of the Act, the district court should have required plaintiffs to make a showing that the state court prosecutions were brought in bad faith or for the purposes of harassment. *Hunt v. Rodriquez*, ____ F.2d ____ (5th Cir., 1972) [No. 71-3394, June 30, 1972]; *Shaw v. Garrison*, ____ F.2d ____ (5th Cir., 1972) [No. 71-2422, July 31, 1972]. *See Stewart v. Dameron*, 448 F.2d 396 (5th Cir., 1971). Such a showing would establish the necessary irreparable injury, *Shaw v. Garrison, supra*. In order to justify federal intervention the court would next have to conclude that the irreparable injury thus established is "both great and immediate." *Younger v. Harris* at 46.[7] After this analytical process has been completed, the district court should consider whether its action is warranted under 28 U.S.C., § 2283. *See Atlantic Coast Line R. R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

The judgment of the district court is VACATED and the case is REMANDED for proceedings consistent herewith.

[7] The preceding textual discussion is, under the rationale of *Becker v. Thompson, supra*, equally applicable to a determination whether a federal court may enjoin imminent or threatened, as distinguished from pending, state criminal prosecutions.

APPENDIX B—OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ORDER

Filed April 15, 1971

This order is a one-judge sequel to a three-judge order entered in this case on December 30, 1970. The original complaint attacked the constitutionality of the Georgia Driver Training School License Act, Ga. Laws 1968, pp. 436, 441, Ga. Code Ann. Supp. §§ 92A-1101, *et seq.* All of the plaintiffs were either owners or drivers (instructors) at various private driver training schools in and around Atlanta and the defendants were the state officers charged with the duty of enforcement. It was *brought* [but not established] as a class action on behalf of the plaintiffs and all others similarly situated.

The only serious bone of contention as stated in the original complaint was the provision of the Act requiring driving instructors at private schools to present evidence of college credits in driver education and safety from an accredited college or university equivalent to those required of driving instructors in the public schools of Georgia. Another section of the Act, § 92A-1109, exempted all public schools and colleges conducting driver programs from the requirements of the Act.

At the three-judge hearing it was urged by defendants, without dispute, that the State Department of Education already had regulations requiring its driving instructors to have a certificate showing three quarter-hours credit in driver education and safety from an accredited college or university, and that the purpose

of the present Act was merely to exact of private instructors the same standards as those already required of instructors in the public schools and colleges. This was offered as justification for exempting the public schools and colleges from the statute.

While the action was pending and on September 29, 1970, the plaintiffs filed an amendment alleging that the Act, in addition to being unconstitutional on its face, was also being applied in a discriminatory fashion in that driving instructors in the public schools and colleges where such instruction was offered were not being required to comply with the educational requirements referred to. Subsequent to the filing of this amendment and on October 8, 1970, plaintiffs sought to begin extensive discovery of the defendants for the purpose of showing that the educational requirements were not being required of public school driving instructors. At that time, the Act in question had not become effective so that there was no way of ascertaining how the Act would be applied once it went into effect. For this reason, and since an unconstitutional application of the Act would not be a matter for a three-judge court in any event, the court declined to allow such discovery to proceed at that time but announced that such ruling would be without prejudice to the right of plaintiffs to bring the matter of an unconstitutional application before a single judge of the court at a later time if it appeared that such discrimination was in fact being practiced.

After a hearing, the three-judge court concluded that the statute was a valid exercise of the police power and was not unconstitutional on its face for any of the rea-

sons assigned.[1] An order of the three-judge court was entered to this effect but with a provision that such ruling should be "without prejudice to plaintiffs' right to contest an unconstitutional application of the Act by state officials should such appear."

Thereafter, on March 23, 1971, plaintiffs filed a motion in the case renewing their contention that the Act was being unconstitutionally applied in that instructors in private driving schools were being charged with violating the educational requirements of the Act and the schools themselves with being put out of business, whereas public school and college driving instructors were not being required to comply with the educational requirements and were not being prosecuted or threatened with prosecution. On this basis the plaintiffs in their motion seek a temporary restraining order and an injunction against the enforcement of the Act.

A full hearing was held on this motion on March 31

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[1] At the hearing before the single judge, defendants contended that public school instructors were exempt from the provisions of the Act. Though this question was not decided, since it appeared both the private and public school instructors were subject to the same educational requirements, the three-judge court did consider the question and suggested that a literal interpretation of the Act did not exempt public school teachers. Except for this construction, the Act might very well have been declared unconstitutional had plaintiffs challenged the Act as providing criminal sanctions for them, while exempting public school instructors from such sanctions for performing the same act. In short, defendants cannot have it both ways: Either public school instructors are included in the Act, in which event they are subject to criminal sanctions, or they are exempt from the Act, in which event the Act might well be successfully challenged as unconstitutional. *See* the three-judge opinion in this case, 320 F.Supp. at 708, 709.

and April 1, 1971, at which time evidence was presented and arguments heard.

Without quoting the evidence or belaboring the point, suffice it to say that plaintiffs fully proved their contention that the Act was not being administered with an even hand. A number of private driving instructors were sworn and, without exception, testified that they had applied for a driver training certificate without the required academic credits and were refused; that, without exception, they were served with criminal citations under the penal provisions of the Act. Ga. Code Ann. § 92A-9926.

At the same time, numerous driving instructors from public schools and colleges were also called by plaintiffs and testified that they were conducting driver training classes at their schools, whereupon it appeared that no one of them had completed the three courses required. Some had completed no course, some had completed one, and some had completed two, but none had completed all. It is axiomatic, as Chief Justice Bleckley of Georgia said long ago, that where three are required, two are equal to zero. It thus appears that although the Act is being enforced against private driving instructors, no effort has been made to enforce it against public school instructors. Moreover, officers of the State Patrol who were also called as witnesses candidly stated that they had no intention of enforcing the Act against public school instructors. None of the public school instructors had been given criminal citations.

For all practical purposes, this statement alone would require that the prayers of plaintiffs' motion be granted. One contention of the defendants, however, while pat-

ently lacking in merit, may be worthy of comment:[3] While freely admitting that the educational licensing requirements for public school instructors were the same as for private instructors, the excuse offered by the defendants for enforcing the Act against one but not against the other was that, under another and different regulation of the State Department of Education, a school system was allowed to have 5% of its faculty teaching "out of field"; that is, if a high school system had 20 teachers in all subjects, it was entitled to have one of those 20 teachers teach "out of the field" in which such teacher was primarily qualified. In other words, in a 20-teacher system, one teacher, though holding a certificate in English, might be allowed to teach history, etc. It was the contention of the defendants that this rule or regulation would justify the instances in which their driver training instructors are allowed to teach driver training without having complied with the educational requirements. Defendants, apparently seeing or scenting the noose, disclaimed any intention of denying to private instructors a similar 5% tolerance. The obvious difficulty with this argument and attempted concession, however, is two-fold: First, the Act with which, under defendants' theory, only the plaintiffs must comply, simply permits of no such 5% tolerance; second, private driver training schools teach nothing but driver training. It is impossible, therefore, for them to ever take advantage of this 5% rule unless all of

[3] Defendants also asserted that this court lacked jurisdiction to enjoin the state criminal proceedings and relied on *Younger v. Harris*, 39 U.S.L.W. 4201 (Feb. 1971). No action taken by this court is in conflict with *Younger*. The jurisdiction of this court clearly attached several months prior to the institution of proceedings against these plaintiffs and the injunction today is merely in aid of the prior jurisdiction of the court.

their teachers (or at least 95%) have already complied with the statute; finally, if the 5% rule be applied by the public schools only to their driver training teachers, as distinguished from all teachers (and this is the only comparable class involved), the defendants themselves are not in compliance with their 5% formula. In fact, at the hearing, not one public school driving instructor was presented who was in full compliance.

The court is of the opinion that this argument would not have availed the defendants in any event, but it comes with even less grace in view of the fact that in seeking to uphold the facial constitutionality of the statute to the defendants and their counsel assured the court that under the Act all instructors were to be treated just alike. Under the evidence now presented, it appears that this simply is not and was not the case.

For the foregoing reasons, plaintiffs are entitled to injunctive relief which (1) enjoins enforcement of the Act against plaintiffs until such time as it shall appear to the court that the Act will not be enforced in a discriminatory manner, and (2) restrains continued prosecution of plaintiffs for violation of the Act under any citation heretofore issued since the filing of this action and while this court retains jurisdiction of this case. Counsel for plaintiffs is DIRECTED to prepare, serve upon counsel for defendants, and submit to the court an order to this effect.

IT IS SO ORDERED.

This 14 day of April, 1971.

NEWELL EDENFIELD
United States District Judge

APPENDIX C—OPINION OF THE THREE-JUDGE DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(Bears no designation)

Filed and Entered Dec. 30, 1970

Before: BELL, Circuit Judge, SMITH and EDENFIELD, District Judges.

EDENFIELD, District Judge:

Plaintiffs, operators of various commercial driving schools and the driving instructors of Taggart's Driving School, have brought this action against certain officials of the State of Georgia seeking a declaratory judgment and injunctive relief. Specifically, plaintiffs ask the court (1) to declare unconstitutional a portion of the Georgia Driver Training School License Act, Ga. Code Ann. § 92A-11 (hereinafter the Act), and (2) to permanently enjoin defendants from enforcing the provisions of the Act against them. The portion of the Act alleged to be unconstitutional is Ga. Code Ann. § 92A-1104(b), which provides that:

> "Every person in order to qualify as instructor for a driving school shall meet the following requirements: . . . (b) Must present to the department [Department of Public Safety] evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia."

Though several constitutional challenges are presented in the complaint, plaintiffs rely primarily on only

three.[1] First, plaintiffs contend that the educational requirements of Ga. Code Ann. § 92A-1104(b) are arbitrary and capricious in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they bear no reasonable relation to the purpose of the Act or the ability to teach driver training. Second, plaintiffs contend that the section represents an unconstitutional delegation of legislative power in that insufficient guidelines are provided for the establishment of the educational requirements. Third, plaintiffs contend the Act discriminates against them in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution in that it establishes the same requirements for both commercial and public school instructors and then exempts the public school teachers from the operation of the Act.

Defendants suggest that a state court action between similar parties contesting the constitutionality of the Act is res judicata, and thereby bars plaintiffs from maintaining this action. This suggestion cannot prevail under the circumstances of this case. Though there is some question as to whether the suit brought in state

[1] In addition to their three primary challenges, plaintiffs contend (1) that they are deprived of their employment without due process, (2) that Ga. Code Ann. § 92A-1104(b) is in violation of due process in that it is vague and uncertain, (3) that the standards for driving instructors, as set by the Act, are more stringent than the standards in similar fields and therefore in violation of equal protection, and (4) that the failure of the legislature to include a savings clause in the Act, when such clauses have allegedly always been included in past similar situations, denies equal protection. Plaintiffs have not insisted on these contentions either by brief or argument. Furthermore, considering both the language and purpose of the Act, they are without merit.

court was a class action and whether all members of the class received adequate notice of the suit, these questions need not be reached in view of the relationship between Plaintiff Jett d/b/a Georgia Driving School and the state court action. When the state court action was instituted, Plaintiff Jett was not a resident of Georgia and had neither actual nor constructive notice of the suit. Since the court concludes that it must resolve the issues as to Jett, it will resolve the issues as to all plaintiffs.

Plaintiffs' due process attack on Ga. Code Ann. § 92A-1104(b) is without merit. Though there is no precise formula to be applied in due process analysis, the test applied by the Second Circuit Court of Appeals seems representative of the approach taken by the courts. There the Court stated that:

> "It is only the 'invidious discrimination' or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). A classification or regulation, on the other hand, 'which is reasonable in relation to its subject and is adopted in the interests of the community is due process.' *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937)." *Gruenwald v. Gardner*, 390 F.2d 591, 592 (2d Cir. 1968).

The function of the court is not to "sit as a 'superlegislature to weigh the wisdom of legislation,' " *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952); but rather to determine whether the purpose of the legislation is legitimate and whether the requirement imposed by the legislation is reasonably related to achieving the ends sought by the legislation.

The purpose of the Act, though not specifically stated, is obviously to improve the quality of driving instruction received by prospective drivers in the State of Georgia and to protect the public from unqualified commercial driving programs. The achievement of this purpose is clearly a legitimate exercise of the State's police power and is particularly appropriate in light of the many tragedies which presently occur on our streets and highways. Furthermore, the educational requirements[2] of Ga. Code Ann. § 92A-1104(b) are not unreasonable. To require commercial driving instructors to present evidence of educational credit in the field of driver education and safety is both reasonably related to the ability to teach driving skills and the achievement of the purpose of the Act.

Plaintiffs also contend that Ga. Code Ann. § 92A-1104(b) constitutes an unconstitutional delegation of legislative power. The court notes, however, that Ga. Code Ann. § 92A-1104(b) makes no delegation but merely accepts the existing requirements applicable to teachers in the public schools of Georgia. Since the educational requirements for public school teachers are set by the Board of Education, plaintiffs would appear to attack the delegation to the Board of Education,[3] however, plaintiffs have not attacked this delegation by the Georgia legislature.

In considering plaintiffs' equal protection argument, there is some question as to whether the Act exempts

[2] The educational requirements, as set by the Board of Education, consist of three five-quarter hour courses offered through the University of Georgia system and relating solely to driver education and public safety. Credits from foreign educational institutions are accepted.

[3] Such an attack would appear to relate to Ga. Code Ann. § 32-603.

teachers in the public schools from operation of the Act as plaintiffs contend. Ga. Code Ann. § 92A-1109 sets forth the exemptions from the Act and provides:

> "This Chapter shall not apply to an accredited elementary school, secondary school, junior college or college conducting a driver training course, nor shall it apply to driver improvement schools operated by this State, a county or a municipality thereof."

Nothing in the exemption provisions of the Act specifically exempts public school teachers. Rather the only class specifically exempted is accredited educational institutions conducting a driver training course and state and local government-conducted driver improvement schools. Since a literal interpretation of Ga. Code Ann. § 92A-1109 does not exempt public school driver education teachers, both classes of driving instructors are operating under the same standards and restrictions and there is no denial of equal protection. Even assuming that public school driver education teachers are exempt from operation of the Act, both classes are still subject to exactly the same educational requirements.[4] Therefore Ga. Code Ann. § 92A-1104(b) when considered with Ga. Code Ann. § 92A-1109 is not unconstitutional on its face as a denial of equal protection.

Though the portion of the Act as challenged by plaintiffs is not unconstitutional on its face, the Act could conceivably be applied to plaintiffs in such a man-

[4] Assuming public school teachers are exempt from the Act, plaintiffs have failed to contest any condition incident to the distinction between commercial driving instructors and public school instructors. As noted above, both classes are subject to the same educational requirements in the area of driver education and public safety. Absent a showing that one class is unreasonably subjected to a condition or requirement to which the other class is not subject, there is no denial of equal protection.

ner as to violate constitutionally protected rights.[5] This, however, is not a proper question for a three-judge district court. 28 U.S.C. § 2281. *Benoit v. Gardner*, 351 F.2d 846 (1st Cir. 1965); *McGuire v. Sadler*, 337 F.2d 902 (5th Cir. 1964).

It is therefore ORDERED and ADJUDGED that Ga. Code Ann. § 92A-1104(b) is not unconstitutional on its face, and the relief requested by plaintiffs is DENIED, but without prejudice to plaintiffs' right to contest an unconstitutional application of the Act by state officials should such appear.

This 23rd day of December, 1970.

/s/
GRIFFIN B. BELL
United States Circuit Judge

/s/
SIDNEY O. SMITH, JR.
United States District Judge

/s/
NEWELL EDENFIELD
United States District Judge

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[5] While making no judgment whatsoever as to the merit of future constitutional challenges, the court notes that possible challenges of unconstitutional application could be raised. Merely as an example, the State could insist upon strict compliance with the educational requirements of the Act in the case of commercial driving instructors, while waiving such compliance in the case of public school teachers. Further, under the baffling legislative scheme established by the Act and a literal interpretation thereof, an individual commercial driving instructor could be deemed a "driver training school" under the provisions of Ga. Code Ann. § 92A-1101(b) and therefore subject to the insurance, bond, and fee provisions of Ga. Code Ann. § 92A-1103. Any attempt by the State to make such an application of the Act, while exempting public school teachers, might give rise to an equal protection challenge to such an application. In sum, the Act, while not unconstitutional on its face as challenged, is sufficiently confusing to suggest that there might be future litigation regarding the constitutionality of its application; and this court will not foreclose such future litigation.

APPENDIX D—FULL TEXT OF CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

(1) Paragraph 1 of the Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) Ga. L. 1968, pp. 436, 441, Ga. Code Ann. Chpt. 92A-11 (Supp. '70).

THE DRIVER TRAINING SCHOOL LICENSE ACT.

No. 940 (House Bill No. 967).

An Act to regulate driver training schools; to provide for their licensing and licensing of an instructor of a school; to provide for qualifications, insurance requirements, bond requirements, the renewal of licenses, registration fees and disposition of the moneys received; to provide for penalties for violations; to provide an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. *Definitions.* The following words and

phrases when used in this Act shall, unless the content otherwise requires, have the meanings respectively ascribed to them in this section:

(a) "Motor vehicle" Every vehicle which is self-propelled upon or by which any person or property is or may be transported or drawn upon a public highway except devices used exclusively upon stationary rails or tracks.

(b) "Driver training schools" Any person, partnership or corporation giving driving instruction to ten (10) or more persons per calendar year for the purpose of meeting requirements for licensed driving of motor vehicles in Georgia.

(c) "Person" Every natural person, firm, copartnership, association, corporation, or school.

(d) "Department" The State Department of Public Safety acting directly or through its duly authorized officers and agents.

(e) "Driver's license examiners" Examiners appointed by the Department of Public Safety for the purpose of giving driver's license examinations.

Section 2. No person shall operate a driver training school or engage in the business of giving instruction for hire in the driving of motor vehicles or in the preparation of an applicant for examination given by driver's license examiners for a driver's license or permit, unless a license therefor has been secured from the department.

Section 3. Every person in order to qualify to operate a driving school shall meet the following requirements:

(a) Be of good moral character.

(b) Maintain an established place of business to the public.

(c) Maintain bodily injury and property damage liability insurance on motor vehicles while used in driving instruction, insuring the liability of the driving school, the driving instructors and any person taking instruction in at least the following amounts: One hundred thousand dollars ($100,000) for bodily injury to or death of one person in any one accident and, subject to said limit for one person, two hundred thousand dollars ($200,000) for bodily injury to or death of two (2) or more persons in any one accident and the amount of twenty thousand dollars ($20,000) for damage to property of others in any one accident. Evidence of such insurance coverage in the form of a certificate from the insurance carrier shall be filed with the department, and such certificate shall stipulate that the insurance shall not be canceled except upon ten (10) days prior written notice to the department. Such insurance shall be written by a company authorized to do business in this State.

(d) Provide a continuous surety company bond in the principal sum of two thousand, five hundred dollars ($2,500) for the protection of the contractual rights of students in such form as will meet with the approval of the department and written by a company authorized to do business in this State. However, the aggregated liability of the surety for all breaches of the condition of the bond in no event shall exceed the principal sum of two thousand, five hundred dollars ($2,500). The surety on any such bond may cancel such bond on giving thirty (30) days notice thereof in writing to the

department and shall be relieved of liability for any breach of any condition of the bond which occurs after the effective date of cancellation.

(e) Have the equipment necessary to the giving of proper instruction in the operation of motor vehicles as prescribed by the department.

(f) Pay to the department an application fee of twenty-five dollars ($25).

Section 4. Every person in order to qualify as instructor for a driving school shall meet the following requirements:

(a) Be of good moral character.

(b) Must present to the department evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia.

(c) Be physically able to operate safely a motor vehicle and to instruct others in the operation of motor vehicles.

(d) Hold a valid driver's license.

(e) Pay to the department an application fee of five dollars ($5).

Section 5. (a) The department shall issue a license certificate to each applicant to conduct a driver training school or to each driver training instructor when the department is satisfied that such person has met the qualifications required under this Act.

(b) All outstanding licenses issued to any driver training school or driver training instructor pursuant

to the provisions of this Act, shall expire as a matter of law at midnight on September 30 of the calendar year for which the license was issued and must be renewed annually, unless sooner canceled, suspended or revoked under the provisions of Section 7 of this Act.

(c) The license of each driver training school and each driver training instructor may be renewed subject to the same conditions as the original license, and upon payment of the same fee.

(d) All applications for renewal of a driver training school license or driver training instructor's license shall be on a form prescribed by the department, and must be filed with the department not more than sixty (60) days, nor less than ten (10) days preceding the expiration date of the license to be renewed.

Section 6. The department is authorized to prescribe by rule standards for the eligibility, conduct, equipment, and operation of driver training schools and instructors and to adopt other reasonable rules and regulations to carry out the provisions of this Act.

Section 7. The department may cancel, suspend, revoke, or refuse to renew any driver training school or driver training instructor's license, upon good cause being shown and after 10 days notice to the license holder:

(a) When the department is satisfied that the licensee fails to meet the requirements to receive or hold a license under this Act.

(b) Whenever the licensee fails to keep the records required herein.

(c) Whenever the licensee permits fraud or engages in fraudulent practices either with reference to the applicant

or the department, or induces or countenances fraud or fraudulent practices on the part of any applicant for a driver's license or permit.

(d) Whenever the licensee fails to comply with any provision of this Act or any rules of the department made pursuant thereto.

(e) Whenever the licensee represents himself as an agent or employee of the department or licensed examiners or uses advertising designed to lead or which would reasonably have the effect of leading persons to believe that such licensee is in fact an employee or representative of the department or license examiners.

(f) Whenever the licensee or any employee or agent of the licensee solicits driver training or instruction in an office of any department of the State having to do with the administration of any law relating to motor vehicles.

(g) Whenever the licensee or any employee or agent, serving as a driver training instructor, has had his license canceled, suspended, or revoked.

Section 8. All moneys received under this Act shall be deposited with the State Treasurer.

Section 9. Any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor.

Section 10. This Act shall not apply to an accredited elementary school, secondary school, junior college or college conducting a driver training course, nor shall it apply to driver improvement schools operated by this State, a county or a municipality thereof.

Section 11. This Act may be cited as "The Driver Training School License Act."

Section 12. This Act shall be effective on October 1, next succeeding its passage and approval by the Governor, or its otherwise becoming a law.

Section 13. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 27, 1968.

(3) 28 U.S.C., Section 1331.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

(4) 28 U.S.C., Section 2281.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such

State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 U.S.C., Section 2284.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any

department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

(5) 28 U.S.C., Section 2201.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

(6) 28 U.S.C., Section 2283.

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 68.

APPENDIX E—JUDGMENT AND ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING REHEARING

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 71-2853

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL,

Plaintiffs-Appellees,

versus

COLONEL R. H. BURSON, Director of the Georgia Department Public Safety, ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(January 5, 1973)

ON PETITION FOR REHEARING

Before: GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX F—JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ISSUED AS MANDATE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

NO. 71-2853

D. C. Docket No. 14104

KENT MILNER d/b/a BELVEDERE DRIVING SCHOOL, ET AL,

Plaintiffs-Appellees,

versus

COLONEL R. H. BURSON, Director of the Georgia Department Public Safety, ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before: GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that each party bear his own costs on appeal in this Court.

December 6, 1972

Issued as Mandate: January 15, 1973

APPENDIX G—ORDER RECALLING AND STAYING MANDATE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 71-2853

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL,

Plaintiffs-Appellees,

versus

COLONEL R. H. BURSON, Director of the Georgia Department of Public Safety, ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

---

Before: GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

ON CONSIDERATION OF THE MOTION of Appellees for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate, be recalled and stayed to and including

March 1, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1172

KENT MILNER, d/b/a/ BELVEDERE DRIVING SCHOOL, ET AL.,

Petitioners,

v.

COLONEL R. H. BURSON
DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

The Respondents in the above-entitled case file this memorandum to advise the Court of certain facts which, in Respondents' view, render this cause moot.

The questions which the Petitioners, who are commercial driver training schools and instructors, seek to raise in this review are two:

"(1) Did the Court below err in holding that the District Court's injunction encompassed 'pending'

as well as future state prosecutions, thus raising the problems considered by the Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971) and by the Fifth Circuit Court of Appeals in *Becker v. Thompson*, 459 F. 2d 919 (5th Cir. 1972).

"(2) Did the Court below err in holding that even where the action for declaratory relief was brought in the District Court several months prior to the institution of state criminal proceedings against the Petitioners, the District Court should not have considered issuance of an injunction in aid of its jurisdiction under 28 U.S.C., Section 2283, without having first applied the *Younger* restrictions regarding *interference* in the state criminal proceedings?" (Petition for Writ of Certiorari, hereinafter "Petition," pages 2-3).

Both of these questions necessarily relate to that portion of the State's statute which formed the basis for the controversy. The statute is The Driver Training School License Act of Georgia (Petition, pages 1D-6D) and particularly Section 4(b), which requires certain educational qualifications for instructors' licenses:

"Every person in order to qualify as instructor for a driving school shall meet the following requirements:

* * *

(b) Must present to the department evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors

in the public schools of Georgia." (Petition, page 4D).

The licenses, which are required of all driving instructors for hire, are to be issued annually, a fee is to be charged, and the commercial schools, which are also required to be licensed under the Act, are not to employ unlicensed instructors. In addition to the administrative sanctions of refusing, revoking, cancelling, or suspending licenses, the Act provides a criminal sanction by making it a misdemeanor to violate any of its provisions. (Petition, pages 1D-7D).

In August 1970, Plaintiffs sought a judgment declaring that the educational requirement was unconstitutional and enjoining its anticipated enforcement, which it was alleged would begin September 1, 1970.[1] The complaint was amended on September 29, 1970, to complain that the educational requirement was being unconstitutionally applied to Plaintiffs because it was not being applied to teachers in the public schools. No state court prosecutions were then pending, however. The thrust of the relief sought was an obliteration of the educational requirement so that the instructors could obtain State licenses without meeting the educational qualification. They simply sought to excise it from the statute.

A three-judge court ruled that this portion of the Act was not unconstitutional on its face. (Petition, pages 1C-6C). Subsequently, a single-judge court held that the statute, insofar as the educational requirement was

[1]Although the Act was to be effective beginning October 19, 1968, state court action had restrained enforcement between May 20, 1969, and September 1, 1970. Enforcement was federally restrained beginning August 25, 1970.

involved, was being applied unequally to commercial school instructors as opposed to instructors in exempted schools (i.e., accredited elementary and secondary schools, colleges and government-operated driver schools. See Section 10 of the Act, Petition, page 6D), due to the State's construction of the Act. The court did not issue a declaratory judgment but did enjoin enforcement of the educational requirements against Plaintiffs and restrained continued prosecution of existing and future citations. (Petition, page 6B, and order of July 14, 1971).

Only one Plaintiff, David Currier, had received citations at the time of the single-judge court's order. He was to appear in a State court on the two citations, issued after the three-judge ruling of constitutionality, on the day after the single-judge court hearing began.[3]

The educational requirement provision of the Act has now been changed. By Ga. Laws 1973, H.B. 539, the General Assembly liberalized the educational requirement by providing an alternate method of compliance so as to allow instructors to completely avoid the college courses which have so strenuously been fought in this suit. Instead of requiring, in effect, three college courses of fifteen hours credit, instructors can qualify instead by simply passing an examination. The revised requirement, which was brought about by amending the Act so as to strike the section complained of and insert in lieu of it a new section, provides:

"(b) Must present to the department evidence of

[3]Although Kent Milner received a citation and was to appear several weeks thereafter, his citation was to him as an instructor, whereas his position as a plaintiff was only in his capacity as a driving school, so he did not occupy the position of a prosecuted instructor in this case.

credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia or satisfactory performance on a written, oral, performance or combination examination administered by the department testing both knowledge of the field of driver education and skills necesssary to instruct and impart driving skills and safety to students. The examination shall be administered quarterly or upon the written application of four or more prospective licensees. The examination fee shall not exceed twenty-five dollars."

This will become effective July 1, 1973 (Ga. Code Ann. §102-111). Consequently, no citations can thereafter be issued for non-compliance with the old requirement, nor can there be any other kind of enforcement thereof. The inquiries posed by Petitioners focus on the authority of the single-judge district court to grant injunctive relief in this case against enforcement, by whatever means, of the educational requirement. The original relief sought by all Petitioners, as well as the entirety of the original complaint, is moot because of the change in the very section of the statute complained of.

Although it is not impossible to grant the relief ultimately sought by the Petitioners, that is, the declaration that the statute is unconstitutionally applied and injunction against its enforcement, such relief would be an empty vacuum. This obviously results because Respondents would not be authorized to enforce the provision anyway as of July 1, 1973. They are presently under restraint from doing so.

This Court must review the judgment below in light of the Georgia statute as it now stands, not as it once did. *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed 2d 214 (1969), citing *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282, 89 S.Ct. 518, 21 L.Ed 2d 474, and others. Under the statutes as currently written, Petitioners are not compelled to meet the educational requirements about which they complain. They have an alternative. Thus the case has lost its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions on abstract propositions of law. See *Hall v. Beals, supra*, 396 U.S. at 48.

If the case is considered as not rendered moot, and Petitioners were to ultimately prevail in the maze of procedural tangle engulfing this case, the most they could achieve would be a declaration that a now-replaced statutory provision is unconstitutional as it was construed by the State officials, a hollow injunction against its enforcement, and an injunction against the continued prosecution of the citations issued to Plaintiff Currier while the federal suit was pending. The statutory amendment renders absolutely moot the primary complaint and the effort of Petitioners to avoid compliance with the education requirements. All of the complaints made by the Petitioners (and this is not a class action: see Petition, pages 2C and 3C, page 1B), are a dead issue.

That leaves only the intervening citations against Currier, and the two questions sought to be presented by Petitioners would not survive in a review of this unseparated aspect of the case. The first question, as a matter of fact, seeks to deny that the district court

order was bottomed in part on these pending State prosecutions. It depends for resolution on the potentiality of future prosecutions, of which there can now be none.

In line with established practice and in the light of the suggestion made here, the judgment of the circuit court should be vacated and the case returned to it for remand to the district court with direction that the judgment of the district court be vacated and the complaint dismissed on the ground that the case is now moot. *Morris v. Weinberger*, No. 71-6698, 41 L.Wk. 4309 (February 22, 1973); *Bryan v. Austin*, 354 U.S. 933, 77 S. Ct. 1396, 1 L.Ed 2d 1527 (1957).

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR., Deputy
Assistant Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

Please serve:

DOROTHY T. BEASLEY
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, attorney of record for Respondents Burson, Crowe and Pope, and on behalf of all Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Memorandum Of Respondents Suggesting That The Cause Is Moot on the Petitioners by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses: Westmoreland, Hall & Bryan, Attention: John L. Westmoreland, Jr., Counsel for Petitioners, 3000 First National Bank Tower, Atlanta, Georgia 30303.

This 3rd day of April, 1973.

/s/
DOROTHY T. BEASLEY

SECOND CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, attorney of record for Respondents Burson, Crowe and Pope, and on behalf of all Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Memorandum Of Respondents Suggesting That The Cause Is Moot on the Petitioners, in printed form, by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses: Westmoreland, Hall & Bryan, Attention: John L. Westmoreland, Jr., Counsel for Petitioners, 3000 First National Bank Tower, Atlanta, Georgia 30303.

This ____ day of April, 1973.

DOROTHY T. BEASLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1178

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL.,

Petitioners,

v.

COLONEL R. H. BURSON, DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

PETITIONERS' RESPONSE TO MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

WESTMORELAND, HALL, BRYAN, MCGEE & WARNER
3000 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Petitioners

IN THE

Supreme Court of the United States

No. 72-1172

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL.,

Petitioners,

v.

COLONEL R. H. BURSON, DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

PETITIONERS' RESPONSE TO MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

Petitioners in the above-styled case file this their response to show this Court that this cause is in no wise moot and this Court should issue a writ of certiorari as prayed in their petition heretofore filed.

Without question, the 1973 Amendment to the Driver Training School License Act of Georgia provides an alternative to the formal education requirement provisions of the Act, but the educational requirement provisions of the Act are not directly involved in any

question before this Court. As petitioners view this case, the Act has been held facially constitutional by the three judge District Court panel and the facial constitutionality of the Act is no longer in question. What is in question is the constitutionality of the Act as applied by the enforcement agencies of the State of Georgia against these petitioners and the procedures applied by the District Court in this case vis-a-vis 28 U.S.C. Section 2283 as construed in *Younger v. Harris*, 401 U. S. 37 (1971) and related cases.

Stated another way, the 1973 amendment to the Act changed the prerequisites of qualification for driver training instructor licenses, not the *requirement* for a license and the constitutional question squarely involved here is discrimination in applying the requirement of a license, not the prerequisite for licensing. Section 2 of the Act (petitioner's Appendix 2D) requiring the license is untouched by the 1973 Amendment.

Admittedly, this Court should not pass upon the procedural aspects of this case if its substance is gone and there remains no real case or controversy. Such is not the case here and the substantive controversy is very much alive. Petitioners asked the trial court to determine whether or not the criminal provisions of the Act could be applied to petitioners while teachers of driver education in the public schools were immune from prosecution, and that court held this could not be done. Thus, regardless of what the educational requirements or alternatives may be, the fundamental substantive question of discriminatory application of the criminal provisions of the Act is untouched by the 1973 Amendment.

Petitioners are unable to see into the future and

know exactly how the enforcement agencies of the State of Georgia will apply the license requirements of the Act against them. Obviously, the case is bottomed on facts proved at the evidentiary hearing and those facts were sufficient to convince the trial judge that the criminal provisions of the Act were being applied unconstitutionally. The potential for unconstitutional application of the Act as amended is no less present if not identical, to its application before the 1973 Amendment and this is the foundation of petitioners' complaint against the respondent.

More basically, these petitioners are seeking to have the decision of the Fifth Circuit Court of Appeals reviewed on that Court's application of 28 U.S.C. Section 2283 to these facts; i.e., facts proved before the Act in question was amended. Nothing in the 1973 Amendment changes those facts and, obviously, the Amendment is totally ineffective so far as the application of Title 28 U.S.C. Section 2283 is concerned.

The cause is alive; as alive now as it ever was. This Court should not consider respondents' Memorandum in making its determination to grant Certiorari in this cause.

Respectfully submitted,

WESTMORELAND, HALL, BRYAN, McGEE & WARNER

By: _____
JOHN L. WESTMORELAND, JR.

By: _____
HARRY P. HALL, JR.

By: _____
J. M. CRAWFORD

By: _____
EDWARD E. BATES, JR.

3000 First National Bank Tower
Atlanta, Georgia 30303
658-1935

PROOF OF SERVICE

I, JOHN L. WESTMORELAND, JR., one of the attorneys for Kent Milner, d/b/a Belvedere Driving School, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of April, 1973, I served copies of the foregoing Petitioners' Response to Memorandum of Respondents Suggesting that the Cause is Moot on the several parties thereto, as follows:

(1) On Col. R. H. Burson, Director of Georgia Department of Public Safety, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T. Beasley, 132 State Judicial Building, 40 Capitol Square, N.W., Atlanta, Georgia 30334.

(2) On Hinson McAuliffe, Solictor of the Criminal Court of Fulton County, by mailing three copies in a duly addressed envelope, with first class postage prepaid to Hinson McAuliffe, 53 Civil-Criminal Courthouse, 160 Broad Street, S.W., Atlanta, Georgia 30303.

(3) On Herbert T. Jenkins, Chief of Police, City of Atlanta, Georgia, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Henry L. Bowden, 2614 First National Bank Building, Atlanta, Georgia 30303.

(4) On J. B. Angelo Crowe, Driver Training Consultant, State Board of Education, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T.

Beasley, 132 State Judicial Building, 40 Capitol Square, N.W., Atlanta, Georgia 30334.

Attorney for Petitioners

WESTMORELAND, HALL, BRYAN, McGEE & WARNER
3000 First National Bank Tower
Atlanta, Georgia 30303